UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VHS OF MICHIGAN, INC., d/b/a, DETROIT MEDICAL CENTER (DMC), Respondent, and LOCAL 283, INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT), Charging Party.	Case No. 07-CA-205394

RESPONDENT VHS OF MICHIGAN'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

INTRODUCTION

The ALJ erroneously decided that *Intermountain Rural Electric Association*, 305 N.L.R.B. 775 (1985), is dispositive of this dispute. In its Answering Brief, the General Counsel fails to demonstrate otherwise. Unlike *Intermountain*, the DMC reserved a right in the parties' bargaining agreement and the parties acted *consistently* with this reservation. Indeed, neither the ALJ nor the General Counsel identify any practice that was contrary to this reservation.

While the General Counsel correctly argues that *MV Transportation, Inc*., 368 N.L.R.B. No. 66 (2019), is dispositive of this case; the decision is dispositive in demonstrating that the ALJ erred. The right reserved by the DMC in Article VII, Section 1(A) of the parties' bargaining agreement—i.e., to adopt either a forty-hour or an "8-and-80" compensation schedule—plainly covers the DMC's unilateral action to switch from the latter to the former. The General Counsel's argument that this provision is "silent on how overtime will be paid"[1] is an unreasonable interpretation which conflicts with the contractual language and the ALJ's Decision.

Finally, as set for the below, the General Counsel's argument regarding the DMC's request to defer this contract dispute to the parties' grievance and arbitration procedure is contrary to controlling precedent and the evidentiary record.

ARGUMENT

I. The General Counsel's Arguments Confirm that the ALJ Erred in Concluding that the DMC's Unilateral Change Violated the Act

A. *Intermountain* is Inapposite to this Case

First, the General Counsel fails to show how *Intermountain* controls this case. All agree that *Intermountain* stands for the proposition that a union does not necessarily waive its right to

[1] General Counsel Answering Brief, p. 2.

bargain over a contract term regarding overtime calculations where the parties act inconsistently with it for years. For example, the ALJ might be correct if the DMC negotiated an "8-and-80" compensation schedule in the bargaining agreement, implemented a forty-hour schedule instead, and then years later sought to enforce the "8-and-80" schedule. But that is not the case here. The ALJ and the General Counsel gloss over the fact that this case involves an express reservation by DMC of the right to change the method for calculative overtime. Nor do they identify in what manner and for how long the parties allegedly acted inconsistently with this reservation. There is simply no legal authority to support the ALJ's legal conclusions and that is why the ALJ and the General Counsel desperately attempt to misapply *Intermountain* here.

Second, the General Counsel advances a position here entirely at odds with the bargaining agreement and the ALJ's Decision. According to the General Counsel, Article VII, Section 1(A) is "silent on how overtime will be paid."[2] However, the General Counsel fails to explain how the difference between "8-and-80" and 40-hours schedules has any meaning apart from overtime compensation calculations. The General Counsel overlooks the fact the Section 7(j) of the Fair Labor Standards Act ("FLSA")[3] permits hospitals the flexibility of the "8-and-80" exception to the statute's forty-hour rule for overtime compensation. The forty-hour rule in Section 7(a)(1) provides as follows:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[2] General Counsel Answering Brief, p. 4.
[3] 29 USCS § 207(j).

Section 7(j) of the FLSA set forth the "8-and-80" exception as follows:

> Employment in hospital or establishment engaged in care of sick, aged, or mentally ill. No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Therefore, the overtime provisions of the FLSA give meaning to the difference between "8-and-80" and 40-hours schedules. Indeed, the ALJ recognized this by noting that the alternative "8-and-80" schedule is a statutory exception granted to hospitals by the FLSA.[4] If Article VII, Section 1(A) had nothing to do with overtime compensation, the ALJ would have had no need to discuss the FLSA. In short, the General Counsel's inconsistent arguments are logically flawed and meritless.

B. *MV Transportation* Confirms that the ALJ Erred

In *MV Transportation*, the Board found that the employer did not violate the Act by unilaterally implementing policies because the bargaining agreement "generally grants the Respondent the right to issue, amend and revise policies, rules, and regulations."[5] In reaching this conclusion, the Board rejected the General Counsel's application of the clear and unmistakable waiver standard to argue that the contractual language was insufficiently specific to demonstrate that the Union waived its statutory right to bargain over these changes.[6]

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[4] Decision, fn. 3.
[5] *MV Transp., Inc.,* 2019 N.L.R.B. LEXIS 509, *11-12 (N.L.R.B. September 10, 2019).
[6] *Id.*

Instead, the Board agreed with the employer and adopted the contract coverage standard with retroactive application. In doing so, the Board held as follows:

> Under contract coverage, the Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. For example, if an agreement contains a provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones, the employer would not violate Section 8(a)(5) and (1) by unilaterally implementing new attendance or safety rules or by revising existing disciplinary or off-duty-access policies. In both instances, the employer will have made changes within the compass or scope of a contract provision granting it the right to act without further bargaining. In other words, under contract coverage the Board will honor the parties' agreement, and in each case, it will be governed by the plain terms of the agreement.
>
> On the other hand, if the agreement does not cover the employer's disputed act, and that act has materially, substantially and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer will have violated Section 8(a)(5) and (1) unless it demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason. Thus, under the contract coverage test we adopt today, the Board will first review the plain language of the parties' collective-bargaining agreement, applying ordinary principles of contract interpretation, and then, if it is determined that the disputed act does not come within the compass or scope of a contract provision that grants the employer the right to act unilaterally, the analysis is one of waiver.[7]

Here, and contrary to *MV Transportation*, the ALJ's Decision undermines the negotiated language in the parties' bargaining agreement. Article VII, Section (1)(A) of the bargaining agreement states in relevant part:

> Recognizing that the provisions of health care services may require regular work on seven days per week the regular work schedule for a full-time employee shall consist of eighty (80) hours per 2-week period and eight (8) hours per workday. ***The Employer reserves the right to change the regular work schedule to forty (40) hours, per week***.[8]

[7] *MV Transp., Inc*., 2019 N.L.R.B. LEXIS 509, *5-7 (N.L.R.B. September 10, 2019).

[8] General Counsel Exhibit 1. (Emphasis added). In addition, Article VII provides that "[s]chedules will be made based on management determination of the most expeditious and cost-effective way to schedule overtime[.]" *Id.*, § 4.

Therefore, according to this plain contractual language, the DMC reserved to itself the right to switch from an "8-and-80" to a forty-hour schedule for calculating overtime. Because there is no dispute that the DMC did precisely that here, the DMC "made changes within the compass or scope of a contract provision granting it the right to act without further bargaining."[9] In concluding that the DMC violated the Act, the ALJ erroneously refused to "honor the parties' agreement."[10]

The General Counsel argument to the contrary is meritless. As with its argument in support of the application of *Intermountain*, the General Counsel argues that the parties' bargaining agreement is silent regarding overtime compensation schedules. As argued above, the General Counsel's position is meritless and at odds with the bargaining agreement and the ALJ's conclusion that the provision complies with the FLSA. As such, the General Counsel cannot avail itself of the clear and unmistakable waiver standard in this case.

Accordingly, the ALJ erred in concluding that DMC violated Section 8(a)(5) and (1) by "unilaterally changing its policies as to when unit employees were eligible for overtime pay."

II. The General Counsel's Arguments Confirm that the ALJ Erred by Failing to Defer this Contract Dispute to the Parties' Grievance and Arbitration Procedure

The General Counsel's argument in support of the ALJ's refusal to defer this contractual dispute to arbitration is without merit.

First, the General Counsel incorrectly asserts that the DMC "raised the issue of deferral during pretrial off the record discussions and never filed a formal motion requesting deferral that required a response from Counsel for the General Counsel."[11] The General Counsel cites no authority for its proposition that a "formal motion" is necessary to assert this defense; indeed, the

[9] *MV Transp., Inc.*, 2019 N.L.R.B. LEXIS 509, *5-7 (N.L.R.B. September 10, 2019).
[10] *Id.*
[11] General Counsel Answering Brief, p. 11.

DMC repeatedly raised deferral as an affirmative defense in this proceeding.[12] In addition, on June 23, 2019, the DMC's counsel advanced its position regarding deferral by correspondence with the ALJ and counsel of record. In this correspondence, the DMC agreed to waive time limitations and other procedural defenses if the ALJ granted its request. Therefore, the DMC advanced this defense and the General Counsel had ample opportunity to oppose it.

Turning to the factors in *Collyer Insulated Wire*, 192 NLRB 837 (1971), the General Counsel concedes that the parties enjoy an established collective-bargaining relationship. Though the General Counsel asserts that "this relationship has recently deteriorated,"[13] it generally relies on unproven allegations in its Consolidated Complaint. However, the parties resolved these allegations, which the General Counsel admits.[14] The resolution of the allegations relied upon by the General Counsel manifestly demonstrates the productiveness of parties' relationship.

Finally, regarding the suitability of this case to resolution by arbitration, the General Counsel advances yet again its meritless position that the parties' bargaining agreement is silent regarding overtime compensation. As set forth above, Article VII, Section 1(A) plainly provides that overtime will be computed based on either a forty-hour or an "8-and-80" schedule. This dispute indisputably arises from the DMC's exercise of its reserved right to choose between these schedules. Therefore, this dispute is covered by the parties' bargaining agreement.

Accordingly, the ALJ erred in not deferring this case to the grievance and arbitration procedure in the parties' bargaining agreement.

[12] General Counsel Exhibit 1(m), 1(aa), and 1(bb).
[13] General Counsel Answering Brief, p. 12.
[14] *Id*., fn. 4.

CONCLUSION

For the foregoing reasons, Respondent VHS of Michigan, Inc. respectfully requests that the National Labor Relations Board reverse the Administrative Law Judge's Decision in its entirety and dismiss the Complaint in this matter.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing document via the Board's electronic filing system, and served copies on the Reginal Director, Counsel for the General Counsel, and the Charging Party's Counsel on October 25, 2019 as follows:

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